

1513361 (Migration) [2016] AATA 4758 (29 November 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Kadhum Al Khuzai
VISA APPLICANT:	Ms Hawraa Kshash
CASE NUMBER:	1513361
DIBP REFERENCE(S):	BCC2014/3586072
MEMBER:	Kate Timbs
DATE:	29 November 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that Ms Kshash meets the following criteria for a Subclass 309 (Partner (Provisional)) visa in the <i>Migration Regulations 1994</i>: • Regulation 2.03A; and • clauses 309.211(2) and 309.221 of Schedule 2.

Statement made on 29 November 2016 at 11:27am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant Ms Kshash a Partner (Provisional) (Class UF) visa under section 65 of the *Migration Act 1958* (the Act).
2. Ms Kshash applied for the visa on 30 December 2014 based on her relationship with Mr Al Khuzai. On 23 July 2015, the delegate refused to grant the visa.
3. On 30 September 2015, Mr Al Khuzai applied for review of that decision. The Tribunal heard the application for review on 11 October 2016.

RELEVANT LAW AND ISSUES TO DETERMINE

4. The relevant law is the Act and the Migration Regulations 1994 (the Regulations).
5. For Ms Kshash to be granted the visa, she must satisfy the criteria in Part 309 of Schedule 2 to the Regulations. Relevantly, to satisfy the criteria in clauses 309.211(2) and 309.221, she must be Mr Al Khuzai's spouse or de facto partner when she applied for the visa and when a decision is made to grant or refuse to grant the visa (the relevant times).
6. If Ms Kshash was Mr Al Khuzai's de facto partner at those times, she must also meet additional criteria in Regulation 2.03A that are discussed below.
7. To make a decision on Mr Al Khuzai's application for review, the Tribunal considered whether she meets the relevant criteria in Schedule 2 and the additional criteria in Regulation 2.03A.

CONSIDERATION OF CLAIMS AND EVIDENCE

EVIDENCE CONSIDERED

8. The Tribunal considered evidence in the Department's visa application file and documents provided by Mr Al Khuzai through Ms Arnetta Tolic, migration agent. At hearing, it heard submissions from Ms Tolic and evidence from Mr Al Khuzai, Ms Kshash, Mr Amjad Al Khuzai and Ms Rukia Al Khuzai.

SPOUSE OR DE FACTO RELATIONSHIP

9. Sections 5F and 5CB of the Act define the terms spouse and de facto partner. In both cases, the definitions require Ms Kshash and Mr Al Khuzai:
 - to be mutually committed to a shared life to the exclusion of all others;
 - to have a genuine and continuing relationship; and
 - to be living together or not living apart on a permanent basis.
10. When considering whether that is the case, the Tribunal must consider all of the circumstances of the relationship. In particular, it must consider the financial and social aspects of the relationship, their households and the nature of their commitment to each other.

BACKGROUND TO THE RELATIONSHIP

11. Mr Al Khuzai was born in Australia in 1992. His parents were born in Iraq. He has not married before and has no children.
12. Ms Khuzai was born in Iraq in 1996 and lives there with her parents. She has not married before and has no children.
13. With an exception (discussed below), the evidence provided by Mr Al Khuzai and witnesses at hearing about the development of the relationship was consistent. It was also consistent with the statements contained in the Department's file and those provided to the Tribunal before hearing. The Tribunal accepts it is truthful and makes the findings in the following paragraphs.
14. Ms Kshash is a distant relative of Mr Al Khuzai's mother, Ms Rukia Al Khuzai, and their families were neighbours in the past. She became a close friend of Mr Al Khuzai's sister, Ms Fatima Al Khuzai, when she lived in Iraq during 2013.
15. Mr Al Khuzai and his father travelled to Iraq on 5 July 2013. He met Ms Kshash on 6 July 2013 at a gathering at his paternal grandmother's home. Mr Al Khuzai was attracted to her and they talked for several hours and exchanged telephone numbers. They talked over the phone during the next few days and met again at his grandmother's house. After their second meeting, he told his father and aunt that he would like to marry her and his aunt spoke to her mother who spoke to Ms Kshash. She agreed to marry him and the male members of the family negotiated a dowry. They had a traditional engagement ceremony on 21 July 2013 that included the exchange of gold and silver rings.
16. While Mr Al Khuzai was in Iraq, they talked often on the phone and spent time together, albeit in company with others. Mr Al Khuzai purchased an iPhone for Ms Kshash before he left Iraq in early August 2013. They contacted each other each day by phone, message or video and did not resile from the commitment they made at their engagement.
17. The families made plans for their wedding and Mr Al Khuzai returned to Iraq on 14 January 2014. More than 100 people attended their traditional wedding celebration on 17 January 2014 and they registered the marriage on 4 February 2014. After their marriage, they spent time together before Mr Al Khuzai returned to Australia on 26 February 2014.
18. The inconsistency in the evidence is about their intimate relationship. Mr Al Khuzai said they were intimate but they did not start a relationship that included intercourse. Ms Kshash told the Tribunal they began a sexual relationship after their marriage. She told the Tribunal that was what was expected of a wife and that was what occurred. However, after the hearing, she wrote to the Tribunal stating that Mr Al Khuzai's evidence was correct and that she had been embarrassed to speak of such intimate matters. The Tribunal's impression was that Ms Kshash found it difficult to talk about sexual matters and that is not unlikely because of her age and inexperience. The Tribunal does not find it is an explanation or excuse for providing false information about a matter that is significant to her relationship with Mr Al Khuzai and therefore to her visa application. However, given there were no other inconsistencies in the evidence, the Tribunal finds her dishonesty about this aspect of the relationship does not affect her credibility in relation to the other aspects of the relationship with Mr Al Khuzai which is supported by evidence from other witnesses.

LIVING ARRANGEMENTS

19. Mr Al Khuzai told the Tribunal they spent a lot of time together after their marriage and travelled to a number of different places to visit holy shrines. He said that they usually

shared a bed either at his grandmother's home or at Ms Kshash's home. However, he said there were many family members to spend time with and there were nights when they slept apart because he wanted to spend time with his male cousins. Mr Al Khuzai said they cooked together and Ms Kshash washed and ironed his clothes.

20. The Tribunal does not find that they had set up a shared household at relevant times. However, that is not significant as they are living in different countries.
21. Mr Al Khuzai and his family are constructing a granny flat in the backyard of the family home. The Tribunal accepts the evidence that it is intended as a home for Mr Al Khuzai and Ms Kshash. Ms Kshash confirmed this is where she expects to live with Mr Al Khuzai. The Tribunal finds they have a realistic plan for a future shared household and that they do not intend to live apart on a permanent basis.

FINANCIAL ASPECTS OF THE RELATIONSHIP

22. Both Mr Al Khuzai and Ms Kshash firstly said Mr Al Khuzai started financially supporting Ms Kshash after their marriage. However, they later changed their evidence to say that he started providing regular financial support to Ms Kshash after their engagement. He said the amounts were about \$400 a month and that he gave her extra when she wanted to travel or buy clothes.
23. The internal inconsistency in the evidence makes it unreliable and Mr Al Khuzai cannot corroborate it with the usual evidence of records of transfers. He said his uncle collects rents for his father in Iraq and gave the money directly to Ms Kshash. The Tribunal notes some bank statements show cash withdrawals of similar amounts that he could have used to repay his father. However, he might have used that money to meet his own living expenses.
24. Mr Al Khuzai has more recently sent money to Ms Kshash by money transfer. The Tribunal does not give great weight to these records because it infers the transfers were made to provide evidence to support his application for review.
25. The Tribunal is not satisfied on the evidence that Ms Kshash is financially dependent on Mr Al Khuzai at any relevant time. However, it does not find that this was significant given they are living in different countries. Ms Kshash lives with her family and they continue to meet modest living expenses.
26. The Tribunal has no reason to doubt that Ms Kshash would depend financially on Mr Al Khuzai if she came to Australia. It accepts Mr Al Khuzai paid for the visa application for Ms Kshash and finds that is consistent with its findings about the nature of their commitment, discussed below.

SOCIAL ASPECTS OF THE RELATIONSHIP

27. The engagement and wedding ceremonies were conducted in accordance with traditional Iraqi customs and the Tribunal is satisfied that Mr Al Khuzai and Ms Kshash made commitments to share their lives in the manner expected by their family, friends and acquaintances in Iraq. It finds those people hold the opinion that they are a married couple.
28. The Tribunal found Mr Amjad Al Khuzai and Ms Rukia Al Khuzai to be credible witnesses. It accepts their evidence that Mr Al Khuzai's family and friends consider him to be married to Ms Kshash.
29. The Tribunal is also satisfied they spent time together with others in social situations before and after their wedding and socialised on their own as well after their wedding. They both

spoke of travel to Baghdad and other places within a few hours' drive of Ms Kshash's home and of eating out together. They provided photos to corroborate that they jointly planned and undertook social activities together while Mr Al Khuzai was in Iraq. The Tribunal accepts that is the case and infers they would do the same in Australia.

NATURE OF THE COMMITMENT

30. Mr Al Khuzai and Ms Kshash met a short time before committing to marry in July 2013. They did not know each other well and there is reason to doubt that either had the maturity to make that decision in an informed way. Mr Al Khuzai told the Tribunal he had no previous girlfriends and was very shy during high school. Ms Kshash is very young and the Tribunal infers she also had little experience of relationships.
31. When asked why he made the decision so quickly, Mr Al Khuzai said he was certain of his affection and that he had to make a decision before he left Iraq. He said he would not have been able to maintain a relationship with Ms Kshash without making a commitment to marry her.
32. Ms Rukia Al Khuzai told the Tribunal that she has known Ms Kshash's family since she was a child and is very close to them. For that reason, she is not concerned about their age and that they did not know each other well. Mr Amjad Al Khuzai said he was equally unconcerned and both said it was common in Iraqi culture for persons to marry after knowing each other a short time. Mr Amjad Al Khuzai also told the Tribunal that young people in their culture are encouraged to marry young and to have families. Country information suggests this was not always as common as it is today but that there is a rising trend in Iraq. In 1997, 15% of Iraqi women had married by 18 years. The percentage has increased to 24% in 2016.
33. In those circumstances, the Tribunal does not infer from their youth and the speed of their commitment that the relationship is not genuine. It accepts their evidence of mutual infatuation when they met and Mr Al-Khuzai's evidence that they had to be formally engaged to maintain and develop a relationship.
34. The evidence is that both families were involved in the lead up to the engagement and that both approved of the match. While Mr Al Khuzai and Ms Kshash were inexperienced, they were aware that engagement would result in expectations to marry and to live together as husband and wife in the future. They are both close to their families and the Tribunal infers they entered into the commitment knowing they could not easily resile from it. In that case, it finds it was a genuine and mutual commitment to live together as husband and wife to the exclusion of all others.
35. The questions for the Tribunal are whether their mutual commitment continued when Ms Kshash applied for the visa in December 2014 and whether it continues today. It has been some time since they first met. They spent time with each other in January and February 2014 and the Tribunal accepts their evidence of very regular telephone contact. To that limited extent, they keep each other company although there is no evidence that they provide each other with emotional support. That is not unexpected as they are young, inexperienced in relationships and live with family members who are available to help them with the challenges they might face in their everyday lives.
36. Mr Al Khuzai and Ms Kshash claim the relationship is a genuine love match and the love and regard they had for each other during their initial infatuation has stood the test of time. While Ms Kshash was a nervous witness, Mr Al Khuzai could eloquently describe the qualities that would make her a good life partner for him. On the other hand, Mr Al Khuzai has not returned to visit Ms Kshash in the two and a half years since January 2014. He firstly said it was too dangerous because of the security situation in Iraq and particularly mentioned the

danger of travel from the airport to Ms Kshash's home. However, Mr Amjad Al Khuzai said there is no danger in Ms Kshash's town and Mr Al Khuzai later told the Tribunal that his mother and two sisters visited in 2015. They travelled to and from the airport and made that trip with Ms Kshash on one occasion when they flew to Iran for a holiday with her.

37. Mr Al Khuzai also told the Tribunal he had to study to finish his communications/law degree and had to work to pay for their future. He said he had some mental health issues during 2015 and that they were expecting Ms Kshash to be granted a visa more quickly. The Tribunal is unconvinced by this evidence. It infers that, with careful budgeting and planning, Mr Al Khuzai could have purchased air tickets and made time available for at least a short trip. It finds he did not give priority to spending time with Ms Kshash.
38. In the Tribunal's view, this does not support Mr Al-Khuzai's evidence of a very strong emotional attachment between him and Ms Kshash. It might be that they are no longer infatuated with each other. Nonetheless, their families maintain the same expectations that they will keep their promises to each other. As noted, they are both close to their families and the Tribunal infers this weighs heavily with both of them. In the absence of evidence to the contrary, the Tribunal is satisfied they will conform to those expectations. It finds that the relationship is genuine and continuing and they are mutually committed to sharing their lives to the exclusion of all others.

VALID MARRIAGE

39. It follows from the above findings that Mr Al Khuzai and Ms Kshash are spouses at the relevant time if they are validly married under Australian law.
40. Part VA of the *Marriage Act 1961* (the Marriage Act) deals with the validity of foreign marriages, including marriages that were recognised as valid under the local law at the time of the marriage (section 88C). Section 88D(2) provides that a marriage of that kind is not recognised as valid if one of the parties "was domiciled in Australia" and either party is under marriageable age. Section 11 of that Act defines marriageable age as 18.
41. The Tribunal infers the marriage was valid under local law and there is no dispute that Mr Al Khuzai was "domiciled" in Australia at the time. However, Ms Kshash was 17 years old when her marriage to Mr Al Khuzai was registered on 4 February 2014 in Iraq. It follows that the marriage is not valid for the purposes of the Act and she was not his spouse, as defined by section 5F, at any relevant times.
42. Ms Tolic submitted that the marriage is valid under Australian law because a person under marriageable age may be married with the consent of a State or Territory Court. There is no such court order in this case and, in any event, it does not apply to recognition of foreign marriages that are recognised under a separate part of the Marriage Act.
43. Ms Tolic also made reference to section 88D(3) which provides for recognition of foreign marriages for persons over 16 but under 18 where neither party was domiciled in Australia at the time of the marriage. This section does not apply in this case because Australia was Mr Al Khuzai's domicile at the time of his marriage.

DE FACTO RELATIONSHIP

44. For Ms Kshash to be Mr Al Khuzai's de facto partner when she applied for the visa, she must meet the additional criteria in regulation 2.03A. Relevantly, she satisfied that criteria if, when she applied for the visa, she was at least 18 and had been in the de facto relationship for at least 12 months.

45. Ms Kshash was 18 when she applied for the visa and it is not necessary for her to have been of marriageable age for her to have been in a de facto relationship with Mr Al Khuzai 12 months beforehand.
46. The Tribunal is satisfied that when they became engaged in July 2013, Mr Al Khuzai and Ms Kshash committed to a shared life to the exclusion of all others, had a genuine and continuing relationship and intended to live together when that was possible. It follows that, in December 2013, they were not living separately and apart and they met the other criteria in section 5CB for them to be de facto partners. In that case, the Tribunal finds she was in the de facto relationship for 12 months before she applied for the visa and therefore meets the additional criteria in regulation 2.03A.

CONCLUSION

47. The Tribunal has found that when Ms Kshash applied for the visa and at the time of this decision, she and Mr Al Khuzai had a genuine and continuing relationship and were mutually committed to a shared life to the exclusion of all others. They were not living separately and apart and were therefore in a de facto relationship as defined in section 5CB. It follows that she meets the criteria in clauses 309.211(2) 309.221. The de facto relationship started more than 12 months before she applied for the visa and that means she meets the additional criterion for the grant of the visa in regulation 2.03A.
48. In that case, the Tribunal will send the application for the visa back to the Department for it to consider whether Ms Kshash satisfies the remaining criteria for a Subclass 309 visa.

DECISION

The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that Ms Kshash meets the following criteria for a Subclass 309 (Partner (Provisional)) visa in the *Migration Regulations 1994*:

- regulation 2.03A; and
- clauses 309.211(2) and 309.221 of Schedule 2.

Kate Timbs
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).